Supreme Court, U.S.
FILED
FEB 2 - 2006
OFFICE OF THE CLERK

No. 05-465

IN THE

Supreme Court of the United States

MOHAWK INDUSTRIES, INC.,

Petitioner,

v.

SHIRLEY WILLIAMS, GALE PELFREY, BONNIE JONES, AND LORA SISSON, individually and on behalf of a class,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF PETITIONER

CARTER G. PHILLIPS*
RICHARD D. BERNSTEIN
JUAN P. MORILLO
STEVEN T. COTTREAU
JULIE A. GURLEY
MATTHEW J. WARREN
JIMMY R. ROCK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 2, 2006

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether a defendant corporation and its agents engaged in ordinary, arms-length dealings can constitute an "enterprise" under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO"), in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some distinct enterprise and not just its own affairs.

STATEMENT REQUIRED BY RULE 24.1(B)

Pursuant to Supreme Court Rule 24.1(b), petitioner states that all parties to the proceeding in the court whose judgment is sought to be reviewed are listed in the caption above.

STATEMENT REQUIRED BY RULE 29.6

Pursuant to Supreme Court Rule 29.6, petitioner Mohawk Industries, Inc. states that there is no parent corporation or publicly held corporation that owns 10% or more of Mohawk Industries, Inc.'s stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
STATEMENT REQUIRED BY RULE 24.1(B)	ii
STATEMENT REQUIRED BY RULE 29.6	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISIONS INVOLVED	1
INTRODUCTION	2
STATEMENT OF THE CASE	5
SUMMARY OF ARGUMENT	10
ARGUMENT	12
I. A CORPORATION CANNOT BE A CONSTITUENT OF AN ASSOCIATION-IN-FACT ENTERPRISE UNDER RICO	12
A. An Association-In-Fact Enterprise Must Consist Of Individuals	12
1. Corporations Are Not "Individuals"	12
2. A "Group Of Individuals" Is The Only Combination That Can Be An Association-In-Fact Enterprise	15
B. Limiting Association-In-Fact Enterprises To Groups Of Individuals Is Consistent With RICO's Legislative History And Purposes	20

TABLE OF CONTENTS—continued

Page

II. A CORPORATION DOES NOT CONDUCT OR PARTICIPATE IN THE CONDUCT OF THE AFFAIRS OF A DISTINCT ENTERPRISE BY CONTRACTING FOR ITS OWN BUSINESS ACTIVITIES 27

A. Under § 1962(c), A RICO Defendant Must Conduct Or Participate In The Conduct Of A Distinct Enterprise 28

B. The Lower Courts Have Properly Rejected "Enterprises" That Consist Of A Corporation And Legally Separate Parties Or Entities That Merely Assist In Performing The Corporation's Functions And Activities 30

C. Mohawk Does Not Conduct Or Participate In The Conduct Of The Affairs Of A Distinct Enterprise When It Contracts For Third Parties To Assist In Recruiting Mohawk's Own Employees 33

D. The Eleventh Circuit's Separate Legal Entity Test Is Inconsistent With This Court's Interpretations of RICO's Text And Purposes 38

E. Properly Interpreting RICO Will Not Impair Its Use Against Criminal Wrongdoing 41

CONCLUSION 43

TABLE OF AUTHORITIES

Page

Anatian v. *Coutts Bank (Switzerland), Ltd.*, 193 F.3d 85 (2d Cir. 1999) 30

Arzuaga-Collazo v. *Oriental Fed. Sav. Bank*, 913 F.2d 5 (1st Cir. 1990) 31, 32

Atkinson v. *Anadarko Bank & Trust Co.*, 808 F.2d 438 (5th Cir. 1987) 32

Bachman v. *Bear Stearns & Co.*, 178 F.3d 930 (7th Cir. 1999) 31

Baker v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004) 9, 26, 34, 37

Barnhart v. *Peabody Coal Co.*, 537 U.S. 149 (2003) 15

Bennett v. *Berg*, 685 F.2d 1053 (8th Cir. 1982) 25

Bessette v. *Avco Fin. Servs. Inc.*, 230 F.3d 439 (1st Cir. 2000) 30

Board of County Comm'rs v. *Liberty Group*, 965 F.2d 879 (10th Cir. 1992) 31

Brannon v. *Boatman's First Nat'l Bank of Okla.*, 153 F.3d 1144 (10th Cir. 1998) 32

Brittingham v. *Mobil Corp.*, 943 F.2d 297 (3d Cir. 1991), *overruled on other grounds, Jaguar Cars, Inc.* v. *Royal Oak Motor Co.*, 46 F.3d 258 (3d Cir. 1995) 37, 40

Bucklew v. *Hawkins, Ash, Baptie & Co.*, 329 F.3d 923 (7th Cir. 2003) 32

Bunker Ramo Corp. v. *United Bus. Forms, Inc.*, 713 F.2d 1272 (7th Cir. 1983) 20

Cedric Kushner Promotions, Ltd. v. *King*, 533 U.S. 158 (2001) ..... *passim*

Chang v. *Chen*, 80 F.3d 1293 (9th Cir. 1996) 26

Chevron, U.S.A., Inc. v. *Echazabal*, 536 U.S. 73 (2002) 14, 17

City of Chi. v. *Environmental Def. Fund*, 511 U.S. 328 (1994) 14, 15

TABLE OF AUTHORITIES—continued

Page

Davis v. *Mutual Life Ins. Co. of N.Y.*, 6 F.3d 367 (6th Cir. 1993) 38

Discon, Inc. v. *NYNEX Corp.*, 93 F.3d 1055 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998) 32, 36, 37

Dong v. *Smithsonian Inst.*, 125 F.3d 877 (D.C. Cir. 1997) 16, 17

Federal Land Bank of St. Paul v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) 17

Fitzgerald v. *Chrysler Corp.*, 116 F.3d 225 (7th Cir. 1997) 37, 40

Fogie v. *THORN Ams., Inc.*, 190 F.3d 889 (8th Cir. 1999) 32

Gasoline Sales, Inc. v. *Aero Oil Co.*, 39 F.3d 70 (3d Cir. 1994) 31, 32

H.J., Inc. v. *Northwestern Bell Tel. Co.*, 492 U.S. 229 (1989) 19

Helvering v. *Morgan's, Inc.*, 293 U.S. 121 (1934) 17

INS v. *Elias-Zacarias*, 502 U.S. 478 (1992) 20

Leatherman v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163 (1993) 14

Leocal v. *Ashcroft*, 543 U.S. 1 (2004) 19

Living Designs, Inc. v. *E.I. Dupont de Nemours & Co.*, 431 F.3d 353 (9th Cir. 2005) 31, 35

Mississippi Poultry Ass'n v. *Madigan*, 9 F.3d 1113 (5th Cir. 1993) 13

NCNB Nat'l Bank v. *Tiller*, 814 F.2d 931 (4th Cir. 1987), *overruled on other grounds by Busby* v. *Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990) 32

National Org. for Women v. *Scheidler*, 510 U.S. 249 (1994) 18, 19, 29

TABLE OF AUTHORITIES—continued

Page

Parker & Parsley Petroleum Co. v. *Dresser Indus.*, 972 F.2d 580 (5th Cir. 1992) 31
Phelps Dodge Corp. v. *NLRB*, 313 U.S. 177 (1941) 17
Reves v. *Ernst & Young*, 507 U.S. 170 (1993) ..... *passim*
Riverwoods Chappaqua Corp. v. *Marine Midland Bank, N.A.*, 30 F.3d 339 (2d Cir. 1994) 31
Sedima, S.P.R.L. v. *Imrex Co.*, 473 U.S. 479 (1985) 19, 20
TRW Inc. v. *Andrews*, 534 U.S. 19 (2001) 13
United Sav. Ass'n of Tex. v. *Timbers of Inwood Forest Assocs.*, 484 U.S. 365 (1988) 13
United States v. *Huber*, 603 F.2d 387 (2d Cir. 1979) 20
United States v. *Lanier*, 520 U.S. 259 (1997) 19
United States v. *London*, 66 F.3d 1227 (1st Cir. 1995) 20
United States v. *Navarro-Ordas*, 770 F.2d 959 (11th Cir. 1985) 20
United States v. *Resnick*, 299 U.S. 207 (1936) 19
United States v. *Thevis*, 665 F.2d 616 (5th Cir. 1980) 20
United States v. *Turkette*, 452 U.S. 576 (1981) 20, 26
United States Nat'l Bank of Or. v. *Independent Ins. Agents*, 508 U.S. 439 (1993) 14
Willheim v. *Murchison*, 342 F.2d 33 (2d Cir. 1965) 16

STATUTES

Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 ..... 21, 29
8 U.S.C. § 1324(a) 7
§ 1324b(a)(6) 6

TABLE OF AUTHORITIES—continued

Page

18 U.S.C. § 1546 7
§ 1961 ..... *passim*
§§ 1961-1968 2
§ 1962(c) 2, 5, 28, 33, 39
§ 1963(a) 41, 42
§ 1964 ..... 2, 17
§ 3571 41
42 U.S.C. § 2000e(a) 14
Ga. Code Ann. § 16-14-4 5

RULE

Fed. R. Civ. P. 12(b)(6) 6

LEGISLATIVE HISTORY

S. 2187, 89th Cong. (1965) 24, 25
S. 1623, 91st Cong. (1969) 21
S. 1861, 91st Cong. (1969) 21
S. 30, 91st Cong. (1970) 21
Measures Related to Organized Crime: Hearings Before the Senate Subcomm. on Criminal Laws and Procedures of the S. Comm. on the Judiciary, 91st Cong. (1969) 21
S. Rep. No. 91-617 (1969) 21, 22, 23
115 Cong. Rec. 827 (1969) 21
9566 (1969) 22, 23
39906 (1969) 22
116 Cong. Rec. 585 (1970) 21, 22
591 (1970) 21, 22, 24, 30
600 (1970) 22, 23

SCHOLARLY AUTHORITIES

S. Alito, Jr., *Racketeering Made Simple(r), in The Rico Racket* 1 (G. McDowell ed., 1989) 25, 42

TABLE OF AUTHORITIES—continued

	Page
R. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett* v. *Berg*, 58 Notre Dame L. Rev. 237 (1982)	24
D. Cressey, *The Functions and Structure of Criminal Syndicates, in Task Force Report: Organized Crime* (The President's Comm'n on Law Enforcement & Admin. of Justice ed., 1967)	24
2 O. Obermaier & R. Morvillo, *White Collar Crime, Business and Regulatory Offenses* (2005)	26
J. Rakoff & H. Goldstein, *RICO: Civil And Criminal Law and Strategy* (2005)	22, 23, 26, 30, 31
2A N. Singer, *Sutherland Statutes and Statutory Construction* (6th ed. 2005)	15

OTHER AUTHORITIES

	Page
American Heritage Dictionary of the English Language (1970)	12, 16
American Heritage College Dictionary (4th ed. 2002)	16
Black's Law Dictionary (4th ed. 1968)	13
Webster's Third New International Dictionary of the English Language (1969)	12
J. Grisham, *The Firm* (1991)	35

OPINIONS BELOW

The opinion of the district court denying in part and granting in part the motion to dismiss of petitioner Mohawk Industries, Inc. ("Mohawk") was reported at 314 F. Supp. 2d 1333 (N.D. Ga. 2004) and is reproduced in the appendix to the Petition for Writ of Certiorari (Pet. App.) at 24a–61a. The order of the district court certifying the case for interlocutory appeal was unpublished and is reproduced at Pet. App. 68a–72a. The order of the Eleventh Circuit granting Mohawk's petition for interlocutory appeal was unpublished and is reproduced at Pet. App. 67a. The opinion of the court of appeals affirming in part and reversing in part the district court's order was published at 411 F.3d 1252 (11th Cir. 2005), and is reproduced at Pet. App. 1a–23a. The order of the court of appeals denying rehearing *en banc* was unpublished and is reproduced at Pet. App. 73a.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2005. An order denying petitioner's petition for rehearing *en banc* was entered on August 8, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1961(3) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "person" includes any individual or entity capable of holding a legal or beneficial interest in property[.]

Section 1961(4) of Title 18 to the United States Code provides that:

> [As used in this chapter,] "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

Section 1962(c) of Title 18 to the United States Code provides that:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Section 1964(c) of Title 18 to the United States Code provides in relevant part that:

> Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee[.]

INTRODUCTION

The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 ("RICO") imposes liability upon a person who conducts or participates in the conduct of a separate enterprise through a pattern of racketeering activity. See *id.* § 1964(c). RICO is not a general prohibition of conspiracy or acting in concert to commit certain predicate offenses identified in the statute. To the contrary, it is a much narrower statute aimed only at those who misuse an "enterprise" as that term is defined in the statute. This Court

has ensured adherence to such limitations on RICO liability in order to avoid transforming it into a general liability statute applicable to any alleged conspiracy or business dispute. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

In this case, respondents allege that Mohawk Industries, Inc. ("Mohawk") is liable under RICO because it allegedly hired unauthorized workers and contracted with labor recruiters to assist it in hiring workers. Respondents do not allege that Mohawk is the enterprise, nor do they allege that that any recruiting company is the enterprise. Instead, respondents allege that the "association of Mohawk and the recruiters constitutes an association-in-fact enterprise." JA 24 (Compl. ¶ 79).

The Eleventh Circuit held that respondents had stated a claim under RICO because Mohawk and the recruiters were legally separate entities allegedly acting in a loose or informal association. The theory adopted by the Eleventh Circuit would vastly widen the scope of the "enterprise" element of RICO and thus expand the sweep of the statute. According to the Eleventh Circuit, the "definitive factor" in pleading, or proving, an "association-in-fact" enterprise is the "existence of an association of individual entities, *however loose or informal*, that furnishes a vehicle for the commission of two or more predicate crimes." Pet. App. 7a (emphasis added) (internal quotation marks omitted). Because all alleged corporate conspiracies involve at least a loose or informal association with another entity or individual, this definition of enterprise would allow virtually every alleged corporate conspiracy, including most fraud claims and other business torts, to be pled as civil RICO claims.

The Eleventh Circuit's enterprise theory should be rejected on two main grounds. At the outset, the statutory definition of "enterprise" limits association-in-fact enterprises to groups of individuals, not corporations. Section 1961(4) plainly states that an "association-in-fact" enterprise consists of a "group of *individuals*." 18 U.S.C. § 1961(4) (emphasis

added). Congress' choice of the word "individuals," rather than the very different terms "persons" or "entities," reflects an intent to limit the otherwise boundless scope of an "association-in-fact" enterprise. Interpreting "individuals" to mean "individuals" fully serves the aim of the "association-in-fact" enterprise—to bring the control of gangs and organized crime families within RICO's purview.

Even if, in theory, corporations could be members of association-in-fact enterprises, the alleged "enterprise" of Mohawk and its recruiters runs contrary to this Court's prior guidance on the scope of RICO. This Court has held that a RICO claim must plead an "enterprise" that is functionally distinct from the RICO defendant, *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 160 (2001), *and* that the defendant must have "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs," *Reves*, 507 U.S. at 185 (1993).

In this case, the alleged enterprise is created by Mohawk's contracting for recruiting and employment services. But, a separate "enterprise" is not formed by a corporation's ordinary contractual agreement with a third party for business services. Moreover, Mohawk's alleged conduct in contracting for labor recruiting and employment services does not involve conducting or participating in the conduct of the affairs of some *separate* enterprise. To the contrary, respondents allege only that Mohawk conducted its own business unlawfully. In fact, the allegations of causation and damages make clear that the gravamen of respondents' claim is that Mohawk's operation of its own business caused respondents an injury—not the operation of some separate association-in-fact "enterprise." Specifically, respondents claim that the hiring of unauthorized workers by Mohawk injured them because Mohawk thereby "depressed" the wages Mohawk paid to them. It is clear that all of the allegations—from the alleged illegal hiring to the alleged suppression of

wages—involve the "conduct" of Mohawk's business, not that of some fictional, distinct "enterprise."

In sum, the Eleventh Circuit's decision would permit the pleading of a RICO claim anytime a corporation contracts for services or otherwise acts through an "agent" rather than through its own employees. Such a broad interpretation of the enterprise element of RICO is contrary to the plain language of the statute and would transform RICO into a general civil liability statute for virtually all alleged corporate conspiracies, in contravention of Congress' intent and this Court's longstanding interpretation of the statute.

STATEMENT OF THE CASE

1. On January 5, 2004, respondents filed a complaint in the United States District Court for the Northern District of Georgia on behalf of a putative class of hourly Mohawk employees in Georgia. JA 7 (Compl. ¶ 1). Respondents alleged that they are four current and former Mohawk employees. Mohawk is the world's leading manufacturer of carpet, rugs, tile and other floor coverings. Mohawk manufactures such well-known brands as Karastan, Lees and Bigelow. According to the complaint, Mohawk employs over 30,000 employees, most of whom work in Northwest Georgia. JA 8 (Compl. ¶ 2).

Respondents' complaint concerns Mohawk's core corporate task of hiring employees. Respondents allege that their wages were depressed by "Mohawk's employment and harboring of large numbers of ill[illegible] workers." JA 7 (Compl. ¶ 1). Respondents asserted a federal RICO claim under 18 U.S.C. § 1962(c), two claims under Georgia's RICO statute (Ga. Code Ann. § 16-14-4), and a claim for unjust enrichment under state law. JA 7, 13-14, 25-29 (Compl. ¶¶ 1, 33, 88-110).

As RICO predicate acts, respondents alleged a series of immigration violations, nearly all of which supposedly were

committed by Mohawk and its employees without the aid or involvement of any third party.[1] Respondents alleged that Mohawk "accepted for employment and continued to employ workers that it knew or had reason to know were not authorized to work in the United States" and that Mohawk "knowingly and recklessly accepted" false documents as proof of eligibility for employment.[2] JA 10 (Compl. ¶¶ 15, 16). Similarly, respondents claimed that "Mohawk employees" and "Mohawk supervisors" "assisted illegal workers in attempting to evade detection by law enforcement," "destroyed eligibility documents" to conceal their acceptance of illegal employees, and encouraged illegal aliens leaving the United States "to return to the United States and reapply for work at Mohawk in violation of United States law." JA 11, 13 (Compl. ¶¶ 18, 20, 28).

Persons other than Mohawk employees are mentioned in only two of the 26 paragraphs of factual allegations in the complaint. The complaint alleged that Mohawk employees and "other persons" transported undocumented aliens from Brownsville, Texas to Georgia; that Mohawk paid its employees and "other recruiters" incentives for locating workers; and that "[v]arious recruiters, including Mohawk employees" provided housing to illegal aliens and helped them procure jobs with Mohawk. JA 11-12 (Compl. ¶¶ 22-23).

---

[1] Although the allegations in the complaint must be taken as true at this stage, Fed. R. Civ. P. 12(b)(6), Mohawk categorically denies respondents' allegations of illegal hiring practices. Indeed, as the complaint itself notes, Mohawk complies with its legal obligations and "terminates illegal workers after discovering that they are not authorized to work in the United States." JA 12 (Compl. ¶ 25).

[2] Specifically, the complaint states that "Mohawk employees and supervisors have stated that they are aware that illegal workers can easily obtain false identification." JA 11 (Compl. ¶ 21). However, the law requires employers such as Mohawk to "honor documents tendered that on their face reasonably appear to be genuine" 8 U.S.C. § 1324b(a)(6).

With respect to these allegations, respondents claim that Mohawk violated 8 U.S.C. § 1324(a)(3)(A) by knowingly hiring more than 10 illegal aliens during a 12-month period, JA 19 (Compl. ¶ 59); that Mohawk harbored illegal aliens in violation of 8 U.S.C. § 1324(a)(1)(A)(iii) by "knowingly employing illegal aliens" and "taking steps to shield those illegal aliens from detection," JA 19 (Compl. ¶ 60); that Mohawk's employment of illegal aliens violated 8 U.S.C. § 1324(a)(1)(A)(iv) by encouraging illegal aliens to enter the United States, JA 20 (Compl. ¶ 61); that Mohawk accepted identification documents that it knew were false, in violation of 18 U.S.C. § 1546(a), JA 20 (Compl. ¶ 63); and that Mohawk used identification documents that it knew were false, in violation of 18 U.S.C. § 1546(b), JA 20-21 (Compl. ¶ 64). The complaint does not allege that any third parties were involved in these alleged violations of law.

Respondents' allegations relating to the alleged RICO "enterprise" are exceedingly thin. Respondents assert that Mohawk used third parties such as employment agencies to recruit workers whom Mohawk supposedly knew were illegal aliens. The complaint contains a conclusory allegation that this contractual relationship between "Mohawk and the recruiters constitutes an association-in-fact enterprise." JA 24 (Compl. ¶ 79). Mohawk allegedly "participates in the operation and management of the affairs of the enterprise, which exists for Mohawk's benefit" and has the "common purpose" of "obtaining illegal workers for employment by Mohawk." JA 23 (Compl. ¶¶ 77-78).

Respondents acknowledged that the alleged "association in fact" between Mohawk and the third parties was based upon a contract pursuant to which Mohawk paid fees to the recruiters:

> Each recruiter is paid a fee for each worker it supplies to Mohawk, and some of those recruiters work closely with Mohawk to meet its employment needs by offering a pool of illegal workers who can be dispatched to a

> particular Mohawk facility on short notice as the need arises. Some recruiters find workers in the Brownsville, Texas area and transport them to Georgia. Others, like [Temporary Placement Services], have relatively formal relationships with the company in which they employ illegal workers and then loan or otherwise provide them to Mohawk for a fee.

JA 23 (Compl. ¶ 76). The recruiters allegedly were "sometimes assisted by Mohawk employees who carry a supply of social security cards for use when a prospective or existing employee needs to assume a new identity." *Id.* But, there is no allegation in the complaint that any recruiting agency itself was the RICO enterprise.

2. Mohawk moved to dismiss all four counts of the complaint, arguing, *inter alia*, that respondents had failed to plead participation in the conduct of a distinct RICO enterprise. The district court denied Mohawk's motion to dismiss the RICO claim,[3] but it certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and stayed all further proceedings pending appeal. Pet. App. 61a, 72a. The district court found, *inter alia*, that there was "substantial ground for difference of opinion" on the question whether respondents sufficiently had pled that Mohawk was conducting the affairs of a distinct RICO enterprise. *Id.* at 71a. The Eleventh Circuit granted Mohawk's petition to appeal. *Id.* at 67a.

The Eleventh Circuit affirmed the district court's denial of Mohawk's motion to dismiss the RICO claim.[4] Pet. App.

---

[3] The district court partially granted Mohawk's motion to dismiss the unjust enrichment claim, dismissing respondents' claim for unjust enrichment that arose out of Mohawk's supposed benefit from workers' compensation savings. Pet. App. 61a. That issue is not before this Court.

[4] The Eleventh Circuit reversed the district court's judgment on the unjust enrichment claims in part, holding that respondents' unjust enrichment claim should have been dismissed in its entirety because

23a. According to the Eleventh Circuit, all that was required to plead a § 1962(c) enterprise was allegations of a "loose or informal association of distinct entities." *Id.* at 7a (internal quotation marks omitted). Because Mohawk and the third-party recruiters allegedly were legally "distinct entities ... engaged in a conspiracy to bring illegal workers into this country for Mohawk's benefit," the Eleventh Circuit concluded that together they constituted an association-in-fact enterprise. *Id.* at 7a-8a. The court further held that the respondents' conclusory allegation that "Mohawk participates in the operation and management of the affairs of the enterprise" was sufficient to plead operation or management. *Id.* at 8a (internal quotation marks omitted).

The Eleventh Circuit acknowledged that its interpretation of the RICO enterprise element conflicted with the Seventh Circuit's rejection of materially identical allegations in *Baker* v. *IBP, Inc.*, 357 F.3d 685 (7th Cir.), *cert. denied*, 125 S. Ct. 412 (2004). Pet. App. 9a. Like respondents here, the *Baker* plaintiffs sued a corporation under § 1962(c) for violating immigration laws by employing illegal aliens. The plaintiffs in *Baker* alleged a RICO enterprise that consisted of the corporation and third-party contractors that provided the corporation with employees. See *Baker*, 357 F.3d at 686-87. The *Baker* court held that such allegations were insufficient to plead that the defendant was conducting the affairs of a separate enterprise. See *id.* at 691. The Eleventh Circuit specifically rejected the Seventh Circuit's analysis. According to the panel below, respondents stated a RICO claim under the theory that "Mohawk played some part in directing the affairs of the enterprise" consisting of itself and its contractors and agents. Pet. App. 11a.

Mohawk filed a petition for rehearing *en banc*, which was denied. Pet. App. 73a. The district court, however, continued

---

respondents received the wages for which they contracted. Pet. App. 22a-23a.

its stay of all proceedings pending this Court's review. *Id.* at 65a.

SUMMARY OF ARGUMENT

RICO is not a general criminal conspiracy statute or a basis for invoking federal jurisdiction over business torts. Instead, it is an "enterprise" statute aimed at persons who victimize separate enterprises or use them as a vehicle for criminal activity. To violate § 1962(c), the RICO defendant must be distinct from the RICO "enterprise" and that defendant must participate in the conduct of that distinct enterprise's affairs through a pattern of racketeering activity.

The Eleventh Circuit's approach would completely divorce RICO from its basic foundations. In the Eleventh Circuit, plaintiffs are able to assert a RICO claim against a corporation any time the corporation hires an agent or contractor or other legally separate entity to perform a task related to the subject of the claim. Once it is alleged that the contractor or agent is legally separate from the corporation, it is a simple matter to assert a RICO claim based upon a conclusory allegation that the corporation is "conducting" the affairs of a hypothetical enterprise consisting of the corporation and its agent. The holding below is contrary to the plain language and legislative history of RICO, the canon of construction embodied in the rule of lenity, and this Court's own precedents.

A.

At the outset, a corporation can never be part of an association-in-fact enterprise under § 1961(4). That particular form of "enterprise" can, by definition, only consist of a "group of individuals associated in fact." 18 U.S.C. § 1961(4). This additional category of "enterprise" was added to the definition to bring within the coverage of the statute people who participate in the conduct of "associations

in fact" such as organized crime families and criminal gangs. This "association-in-fact" definition may be broad, but it is not limitless: it is restricted to a "group of *individuals*." Under RICO, "individual" means a natural person, not a corporation or any other legal entity. Because Mohawk is not an "individual," respondents cannot invoke the association-in-fact doctrine to plead a RICO claim. The statute's use of the term "includes" to introduce the definition of enterprise does not change this conclusion, because the structure of § 1961(4) and other RICO provisions indicates that Congress intended the definition to be comprehensive.

B.

Even if Mohawk could be a member of an association-in-fact enterprise, it certainly could not form such an organization by contracting with recruiters. Such an "enterprise" fails for two reasons. First, respondents must allege an enterprise that is distinct from Mohawk itself. Specifically, a plaintiff must "prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 160 (2001). Second, respondents must allege facts indicating that Mohawk "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs." *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

The allegations in this case meet neither requirement. First, respondents have not alleged that the "enterprise" here has any existence separate and apart from the contractual association between Mohawk and its contractors. That contractual association is similar to the association between a corporation and its own employees—an association that universally has been rejected as an alleged "enterprise" separate from the corporation itself. Second, even if Mohawk and its contractors could form an "enterprise," Mohawk is not "conducting" the affairs of that separate enterprise, rather

than conducting its own affairs, when it seeks to obtain employees for its manufacturing business. Despite these limitations on the scope of RICO, Mohawk, like all other corporations, remains subject to prosecution if it were to engage in criminal activity. Corporations are subject to fines and substantial forfeitures under RICO's provisions and the other provisions of federal criminal law.

ARGUMENT

I. A CORPORATION CANNOT BE A CONSTITUENT OF AN ASSOCIATION-IN-FACT ENTERPRISE UNDER RICO.

A. An Association-In-Fact Enterprise Must Consist Of Individuals.

RICO defines the term "enterprise" to "includ[e] any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4). Here, respondents have alleged "an association-in-fact enterprise" consisting of "Mohawk and [its] recruiters" JA 24 (Compl. ¶ 79). Such an allegation is not sufficient under RICO's definition of an association-in-fact enterprise as a "group *of individuals* associated in fact." 18 U.S.C. § 1961(4) (emphasis added).

1. Corporations Are Not "Individuals."

The term "individuals" refers only to natural persons, not corporations. In ordinary usage, the noun "individual" means "a single human being as contrasted with a social group or institution." *Webster's Third New International Dictionary of the English Language* 1152 (1969). See also *American Heritage Dictionary of the English Language* 670 (1970) ("A

single human being considered separately from his group or from society.").[5]

The plain meaning of "individual" as a natural person is reinforced by the structure of § 1961 as a whole. See *United Sav. Ass'n of Tex.* v. *Timbers of Inwood Forest Ass'ns., Ltd.*, 484 U.S. 365, 371 (1988) (a "provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme"). The distinction Congress drew between an "individual" and a legal entity is apparent in § 1961(3)'s definition of "person." That definition separately refers to "any individual or entity," indicating that "individual" refers to natural persons and not an "entity" like a corporation.

Likewise, § 1961(4) refers in its first clause to a series that includes "any individual" *or* "corporation" as types of legal persons that may constitute a RICO enterprise. If the term "individual" encompassed a corporation, there would be no need separately to list the latter entity. "It is 'a cardinal principle of statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (quoting *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001)).

---

[5] Although some (but not all) authorities indicate that the term "individual" occasionally is used to refer to entities, its primary and ordinary meaning refers to natural persons (particularly when "individual" is used as a noun). *See Black's Law Dictionary* 913 (4th ed. 1968) (while individual "very commonly" denotes "a private or natural person as distinguished from a partnership, corporation, or association," it may be used to refer to an artificial person "in proper cases"). As noted above, however, the use of that term in § 1961 as an alternative to entities and corporations makes plain that such arcane usage was not intended here. *See Mississippi Poultry Ass'n* v. *Madigan*, 9 F.3d 1113, 1114-15 (5th Cir. 1993) (explaining that "secondary or tertiary definitions" do not create ambiguity where the structure of a "carefully crafted statute" made clear that Congress intended the primary meaning).

The term "individual" is also used in the plural form in the second clause of § 1961(4), which refers to a "group of individuals associated in fact." The term "individuals" should have the same meaning in this instance—natural persons—that it has in the first clause of § 1961(4) and in § 1961(3). See *Reves*, 507 U.S. at 177 (giving "similar construction" to each use of the term "conduct" in § 1962(c)); *United States Nat'l Bank of Or.* v. *Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 460 (1993) ("Presumptively, identical words used in different parts of [the] same act are intended to have the same meaning" (internal quotation marks omitted)). Accordingly, because the term "individual" refers to natural persons and not legal entities, a corporation may not be a constituent part of an association-in-fact enterprise.

Of course, under the first clause of § 1961(4), the corporation itself may be the enterprise. *See Cedric Kushner*, 533 U.S. at 164-65. However, the defendant person cannot also be the separate enterprise that it controls. *See infra* Section II.A.

Had Congress intended to define "enterprise" to capture an association in fact with a corporation as a constituent member, it could have easily done so. But it did not provide in § 1961(4) for a "group of persons," a "group of entities," a "group of individuals or entities," or a "group including any of the foregoing"—it only included a "group of individuals."[6] Congress' choice of the phrase "group of individuals" among a detailed list of seven different items leads to the "sensible inference that the term left out must have been meant to be excluded—*expressio unius est exclusio alterius*." *Chevron*,

---

[6] In fact, Congress has included groups of corporations in other statutory definitions. *See* 42 U.S.C. § 2000e(a) ("The term 'person' includes *one or more* individuals, ... partnerships, associations, [or] corporations ...." (emphasis added)). "[T]his provision shows that Congress knew how to draft a [broader statute] when it wanted to." *City of Chi.* v. *Environmental Def. Fund*, 511 U.S. 328, 338 (1994) (internal quotation marks omitted).

U.S.A., Inc. v. *Echazabal*, 536 U.S. 73, 81; *Leatherman* v. *Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993). *See also* 2A Norman J. Singer, *Sutherland Statutes and Statutory Construction* § 47:23 (6th ed. 2005) (explaining "there is an inference that all omissions should be understood as exclusions" "when the items expressed are members of an associated group or series, justifying the inference that the items not mentioned were excluded by deliberate choice").

The *expressio unius* inference has particular force here because Congress expressly included corporations in the first clause of § 1961(4), but not the second. "[I]t is generally presumed that Congress acts intentionally and purposely when it includes particular language in one section of a statute but omits it in another." See *Environmental Def. Fund*, 511 U.S. at 338 (internal quotation marks omitted and alteration in original). The juxtaposition of the two clauses of § 1961(4) indicates that Congress made a "deliberate choice" not to include corporations as constituents of association-in-fact enterprises. *Barnhart* v. *Peabody Coal Co.*, 537 U.S. 149, 168 (2003).

2. A "Group of Individuals" Is The Only Combination That Can Be An Association-In-Fact Enterprise.

That Congress defined "enterprise" using the verb "includes" does not provide a license to ignore the specific definition of enterprise that Congress constructed. 18 U.S.C. § 1961(4) ("'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact"). Section 1961(4) begins by stating that "enterprise" includes "any" individual or corporation or "other legal entity." Congress clearly used broad language in the first phrase of § 1961(4) to capture all legal entities. But, in the last phrase of the definition,

Congress employed a narrow and specific definition: "any union or group of individuals associated in fact."

Congress thus broke § 1961(4) into two separate clauses: the first—a list of legal entities—ends with the unlimited phrase "or other legal entities"; the second, which specifies the only non-legal-entity combinations that can be an enterprise, does not. This distinction would be unnecessary if Congress had intended to include combinations of entities and individuals as associations in fact. No fair reading of this language permits substitution of the phrase "group of entities" or "group of corporations" for "group of individuals" simply because the definition begins with the word "includes."

As Judge Friendly explained when confronting a similar definition, although "[d]efinitions in ... legislation often use the word 'include' out of abundant caution," "that does not afford carte blanche to 'include' [additional items], neither expressly mentioned nor within the normal meaning of the language, simply because a court may think this a good idea." *Willheim* v. *Murchison*, 342 F.2d 33, 42 (2d Cir. 1965). Although the word "includes" is often used illustratively to set forth an incomplete list of examples, "includes" should be interpreted as setting forth a complete list when "there appears to be no general principle in sight." *Dong* v. *Smithsonian Inst.*, 125 F.3d 877, 880 (D.C. Cir. 1997) (Williams, J.) (interpreting "includes" to introduce comprehensive definition of "agency"). Judge Friendly's interpretation of "includes" is consistent with the meaning of the term "includes," which may introduce a comprehensive, as opposed to a partial, list. See *American Heritage Dictionary of the English Language* 656 (1970) ("*[i]nclude* can be ... used" to "impl[y] that all of the components are stated"); *American Heritage College Dictionary* 701 (4th ed.

2002) (explaining that "*include* does not rule out the possibility of a complete listing").[7]

Any possible doubt here is removed by comparing § 1961(4), which says only "includes," to § 1964(a), which *twice* says "including, but not limited to." 18 U.S.C. § 1964(a) (using phrase "including, but not limited to" to clarify that the list that follows is incomplete and merely illustrative). When Congress wanted to indicate that a list in RICO was not comprehensive, it used the phrase "but not limited to." The absence of this phrase in § 1961(4) is telling.

In fact, RICO's comprehensive use of the term "includes" in § 1961(4) is consistent with each of its other uses in § 1961—all of which introduce comprehensive definitions. For example, § 1961(9) provides that "'documentary material' includes *any* book, paper, document, record, recording, *or other material.*" *Id.* § 1961(9) (emphases added). In this provision, the inclusion of the phrase "any ...

---

[7] Whether "includes" should be interpreted as introducing a comprehensive list rather than an incomplete list of examples depends on the context of the particular statute in which it appears. *See Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125-26 (1934) (using context of statute to interpret "includes" phrase, in light of the fact that "includes" "may sometimes be taken as synonymous with 'means,'" and sometimes "is used as the equivalent of 'comprehends' or 'embraces'"). Interpreting "includes" as exemplary is appropriate when this language introduces a single example or an obviously incomplete listing. *See Echazabal*, 536 U.S. at 78-79 (listing only one example of what "qualification standards" "may include"); *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 188-89 (1941) (NLRB's broad power "to take such affirmative action ... as will effectuate the policies of this Act" modified by illustrative phrase "including reinstatement of employees with or without back pay" (internal quotations omitted)). An exemplary interpretation is also appropriate when a comprehensive reading would be inconsistent with the structure of the statute. *See Federal Land Bank of St. Paul* v. *Bismarck Lumber Co.*, 314 U.S. 95, 99-100 (1941). By contrast, "includes" should be read as introducing a comprehensive listing where it, as in § 1961(4), introduces a lengthy, carefully-drafted list and where no general meaning can be derived from the list. *See Dong*, 125 F.3d at 880.

other material" provides strong indication that the definition itself covers the full range of "documentary material," and thus "includes" is used in a comprehensive, not an exemplary sense. (Indeed, the use of the catchall phrase "or other material" would be superfluous if "includes" were merely introducing a collection of illustrations.) Likewise, § 1961(3) provides that "'person' includes any individual or entity capable of holding a legal or beneficial interest in property." *Id.* § 1961(3). This is not a list of examples; it is a comprehensive definition. Similarly, it is hard to imagine that § 1961(10)'s definition of "Attorney General" uses "includes" in an exemplary sense. See *id.* § 1961(10) ("'Attorney General' *includes* the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter." (emphasis added)).

In prior cases concerning RICO enterprises, this Court has interpreted the term "includes" in § 1961(4) as a comprehensive term and focused on the specific language introduced by "includes." For example, this Court in *National Organization for Women* v. *Scheidler* reversed the lower court's holding that an enterprise must have an economic purpose. See 510 U.S. 249, 254 (1994). In that case, the respondents argued that § 1961(4)'s use of the term "includes" indicated that the definition of enterprise was only illustrative and that the plain meaning of the term "enterprise" should control. See Tr. of Oral Arg. at 33, *Scheidler*, 510 U.S. 249 (argued Dec. 8, 1993) (asserting that "[e]nterprise is illustrated in the statute, not defined" and thus the Court should look to "its common everyday meaning" of "business venture"); Resp. Brief for R. Terry et al. at 19-21, *Scheidler*, 510 U.S. 249 (filed Sept. 29, 1993) (urging dictionary and the

Fair Labor Standards Act definitions of enterprise which indicate that the term "enterprise" means an organization with an economic goal).

The *Scheidler* Court rejected the argument. In so holding, the Court treated "includes" comprehensively and refused to go beyond the definition of enterprise that Congress included in § 1961(4), reasoning that "Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive." *Scheidler*, 510 U.S. at 261. In short, the Court interpreted the statutory definition of enterprise as comprehensive and not illustrative, as the *Scheidler* respondents urged.

If there were any ambiguity about the scope of sections 1962(c) and 1961(4), the rule of lenity requires that it be resolved in favor of Mohawk. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 491 n.10 (explaining that 18 U.S.C. §§ 1961 and 1962 should be strictly construed under the rule of lenity). It is a bedrock principle that "statutes creating crimes are to be strictly construed." *United States* v. *Resnick*, 299 U.S. 207, 209 (1936). "RICO, since it has criminal applications as well, must, even in its civil applications, possess the degree of certainty required for criminal laws." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 255 (1989) (Scalia, J., concurring in the judgment); see also, *e.g.*, *Leocal* v. *Ashcroft*, 543 U.S. 1, 8 (2004) (rule of lenity applies to statutes that have both civil and criminal application). "[T]he canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997). Under the rule of lenity, if § 1961(4) were ambiguous, it should be given its narrowest, reasonable reading. It is certainly reasonable to read § 1961(4)'s definition of "enterprise" as applying to combinations only of "any union

or group of individuals," and to hold that corporations are not "individuals."[8]

B. Limiting Association-In-Fact Enterprises To Groups Of Individuals Is Consistent With RICO's Legislative History And Purposes.

Congress' choice to limit association-in-fact enterprises to groups of individuals is in keeping both with RICO's purposes and structure. While "[i]n construing statutes," one "start[s] with the assumption that the legislative purpose is expressed by the ordinary meaning of the words used," *INS* v. *Elias-Zacarias*, 502 U.S. 478, 482 (1992), that meaning is completely consistent with the legislative purpose behind association-in-fact enterprises. RICO's stated purpose was

---

[8] Lower court decisions that have placed talismanic reliance on the term "includes" to arrive at a boundless definition of enterprise are wrongly decided. None of the bases for these decisions is persuasive. Some decisions assumed without any reasoning that "corporations" are "individuals." *See United States* v. *Navarro-Ordas*, 770 F.2d 959, 969 (11th Cir. 1985) ("a group of corporations can be a 'group of individuals associated in fact'"). Others grafted language onto § 1961(4) that is plainly not there. *See Bunker Ramo Corp.* v. *United Bus. Forms, Inc.*, 713 F.2d 1272, 1285 (7th Cir. 1983) (adding to end of enterprise definition "and any combination of them"); *United States* v. *Thevis*, 665 F.2d 616, 625 (5th Cir. 1980) (approving of "enterprise" consisting of "'a group of individuals associated in fact with various corporations'"). In addition, many decisions erroneously employed RICO's liberal construction clause, *see United States* v. *Huber*, 603 F.2d 387, 394 (2d Cir. 1979), which this Court has explained should yield to the rule of lenity in the context of § 1961, *see Sedima*, 473 U.S. at 491 n.10. Lastly, some decisions mistakenly relied on this Court's passing statement in *United States* v. *Turkette*, 452 U.S. 576, 580 (1981), that "[t]here is no restriction upon the associations embraced by" § 1961(4). *See United States* v. *London*, 66 F.3d 1227, 1243 (1st Cir. 1995). The issue in *Turkette*, however, was whether "enterprise" is restricted to "legitimate enterprises." 452 U.S. at 579-80. The *Turkette* Court rejected the argument, and explained that there was "no restriction" of the sort. (The association-in-fact enterprise in that case was a criminal organization consisting solely of individuals. *See id.* at 580.)

"to seek the eradication of organized crime in the United States." See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, 923 (1970). Among Congress' primary concerns were its findings that organized crime was using its influence "to infiltrate and corrupt legitimate business and labor unions" and that this corruption was "harm[ing] innocent investors and competing organizations." *Id.*

Indeed, RICO's history is replete with references to the fact that it was aimed at eradicating organized crime and gangs—which as organizations are brought within the Act's sweep by the "group of individuals associated in fact" provision in § 1961(4).[9] When initially introducing the provisions that would later be included in Title IX, Senator McClellan noted "the frustrat[ing] resul[t] when the only consequence of a

---

[9] RICO was passed in 1970 as Title IX of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, tit. IX, 84 Stat. at 941. Senator John McClellan introduced the Organized Crime Control Act on January 15, 1969 as Senate Bill 30, but that bill did not initially include the provisions that would later become RICO. *See* 115 Cong. Rec. 827, 827-29 (1969). Instead, the RICO provisions were drawn from two other bills, Senate Bill 1623 (the Criminal Activities Profits Act, 91st Cong. (1969)), which was introduced by Senator Roman Hruska on March 20, 1969, and Senate Bill 1861 (the Corrupt Organizations Act of 1969, 91st Cong. (1969)), which were jointly introduced by Senators McClellan and Hruska on April 18, 1969. All three bills—along with other organized-crime-related provisions—were the subject of hearings before the Senate Judiciary Committee's Subcommittee on Criminal Laws and Procedures during late March and early June of 1969. *See Measures Related to Organized Crime: Hearings Before the Senate Subcomm. on Criminal Laws & Procedures of the S. Comm. on the Judiciary*, 91st Cong. (1969). Senate Bill 1861 formed the basis for what would later be added as RICO into Senate Bill 30. *See* 116 Cong. Rec. 591, 591 (1970) (noting that "title IX of S. 30 [was] originally introduced as S. 1861"); 116 Cong. Rec. 585, 585 (1970) (remarks by Sen. McClellan describing the process of drafting Senate Bill 30). Some language from Senate Bill 1623 was also incorporated into the RICO provisions of Senate Bill 30. *See* S. Rep. 91-617, at 83 (1969).

conviction [of an individual mobster] is that organized crime and its infiltrated organizations are run by a new leader." 115 Cong. Rec. 9566, 9567 (1969). When those provisions were added as Title IX, he explained that "it is insufficient to merely remove and imprison individual mob members. Title IX attacks the problem by providing a means of wholesale removal of organized crime from our organizations." 116 Cong. Rec. 591, 591 (1970) (introducing amended S. 30). See S. Rep. No. 91-617, at 32 (1969) (Senate Report on the Organized Crime Control Act) (describing the Organized Crime Control Act as a "comprehensive, integrated program designed to deal with the menace of organized crime in the United States.").[10]

The legislative history consistently reflects congressional concern over the actions of "individuals" who were engaged in criminal enterprises, including the leaders of organized crime. See, *e.g.*, S. Rep. 91-617, at 42 (noting that "[o]rganized crime leaders moreover, have been notoriously successful in escaping punishment"). Specifically, in opening debate on the overall bill, Senator McClellan noted that "the most serious aspect of the challenge that organized crime poses to our society is the degree to which its members have succeeded in placing themselves above the law." 116 Cong. Rec. 585, 586 (1970). See also, *e.g.*, 116 Cong. Rec. 600, 602 (1970) (remarks of Sen. Hruska) (Title IX was "designed to remove the influence of organized crime from legitimate

---

[10] *See also* S. Rep. No. 91-617, at 78 (S. 30) (noting while traditional criminal prosecutions had imprisoned "many ... notorious racketeers," "[n]ot a single one of the 'families' of La Cosa Nostra has been destroyed through criminal prosecutions"); 115 Cong. Rec. 39906, 39907 (1969) (explaining Title IX "would prohibit the infiltration of legitimate organizations by racketeers") (remarks by Sen. McClellan); *see also* J. Rakoff & H. Goldstein, *RICO: Civil And Criminal Law and Strategy* § 1.01, at 1-4 (2005) ("Congress enacted RICO in response to a fear of infiltration of legitimate commercial enterprises by traditional organized crime associations, a concern that dates back at least to ... the early 1950s.").

business by attacking its property interests and by removing its members from control of legitimate busines[s]"); S. Rep. No. 91-617, at 79 (noting that RICO was targeted at "individuals" and "the economic base through which those individuals constitute such a serious threat"); *id.* at 82 ("[P]arties who conduct organizations affecting interstate commerce through a pattern of criminal activity are acting contrary to the public interest. To protect the public, these individuals must be prohibited from continuing to engage in this type of activity in any capacity.").[11] Given this concern, Congress drafted a definition of enterprise that contained a final category encompassing any "group of individuals" that was broad enough to ensure that RICO addressed the primary legislative concern over individuals who perpetrated enterprise crimes.

In contrast, RICO's history portrays corporations primarily as victims of organized crime. RICO was designed to clean up infiltrated corporations (and other organizations) through the prosecution of individual RICO defendants. See 116 Cong. Rec. at 602 (1970) (remarks of Sen. Hruska) (Title IX "contains a rather novel, and in my opinion, a most promising and ingenious proposal for crippling organized crime's relatively recent, but spectacularly successful, emergence into the field of legitimate business and unions"); S. Rep. 91-617, at 1 (the "money and power" of organized crime "are increasingly used to infiltrate and corrupt legitimate business and labor unions"); *id.* at 76-77 (detailing legislative findings that supported RICO focused on organized crime's perceived

---

[11] *See also* 115 Cong. Rec. at 9567 (remarks of Sen. McClellan introducing Senate Bill 1861) (under RICO, "[i]f an organization is acquired or run by the proscribed racketeering method[s], then the persons involved are removed from the organization"); S. Rep. No. 91-617, at 37-40 (collecting tables detailing the hierarchical structure of particular mob families in the United States); Rakoff & Goldstein, *supra* §§ 1.02, 1.05 (explaining that, although generally worded, the design of RICO "reflects legislative findings that mobsters were infiltrating legitimate busines[s]").

"infiltration of legitimate businesses") (capitalization omitted); 116 Cong. Rec. at 592 (listing legitimate organizations infiltrated by organized crime). Thus, it is not surprising that Congress did not include a grouping of corporations in the definition of an association-in-fact enterprise.

In fact, Congress had earlier considered but did not pass a definition broad enough to include any combination involving a corporation. See S. 2187, 89th Cong. (1965). For years, Congress had considered how to draft a statute that would properly define criminal enterprises in a manner that encompassed organized crime. The "concept of 'enterprise criminalty' [sic] that RICO embodies ... owes its origin, in significant part, to Professor [Donald] Cressey's" Report commissioned by President Johnson's Task Force on Organized Crime. R. Blakey, *The RICO Civil Fraud Action in Context: Reflections on Bennett v. Berg*, 58 Notre Dame L. Rev. 237, 253 n.46 (1982). That report noted that "if 'organized crime' is to be controlled, legislatures must in the long run be able to define it as precisely as burglary or larceny or murder are now defined in criminal statutes." D. Cressey, *The Functions & Structure of Criminal Syndicates*, in *Task Force Report: Organized Crime* 25, 57 (The President's Comm'n on Law Enforcement & Admin. of Justice ed., 1967). Professor Cressey echoed the congressional focus on individuals, noting the failure of criminal law to properly define organized crime "permit[ted] directors of criminal business organizations to remain immune from arrest, prosecution, and imprisonment unless they themselves violate specific criminal laws." *Id.*

Professor Cressey's report also noted a prior unsuccessful legislative effort to define and combat organized crime: Senate Bill 2187. *See id.* at 59. That bill sought to outlaw membership in the Mafia or "any other organization having for one of its purposes" the commission of racketeering acts. S. 2187 § 2(a). In that bill, "'organization' mean[t] any

group, association, society, confederation, or syndicate whose aims, objectives, and purposes" included the commission of racketeering-type acts. *Id.* § 3(2). After the bill failed to garner support, RICO was drafted with the §1961(4) definition of enterprise that omitted the broad "any group" language contained in Senate Bill 2187.

Nothing in RICO's legislative history suggests Congress intended RICO "enterprises" to include unwieldy and difficult to parse associations-in-fact of corporations and their agents. Such associations—to the extent they exist—were irrelevant to the problems Congress was targeting. As Justice Alito has explained, RICO had "two aims": "to make it unlawful for *individuals* to function as members of organized criminal groups" and "to stop organized crime's infiltration of legitimate businesses." S. Alito, Jr. *Racketeering Made Simple(r)*, in *The RICO Racket* 1, 3-4 (G. McDowell ed., 1989) (emphasis added). A mob family consisted of a "group of individuals," and thus is swept within § 1961(4) association-in-fact enterprise. Congress was also concerned about organized crime victimizing a corporation, but that problem is addressed by defining enterprise to include "any ... corporation."

In fact, Congress had good, practical reasons not to broaden the category of "association-in-fact" enterprises beyond what was necessary to target the problems at hand. An enterprise consisting of a single entity, such as a corporation or any of the other entities specifically enumerated in § 1961(4), is easy for courts to identify. See *Bennett* v. *Berg*, 685 F.2d 1053, 1060 (8th Cir. 1982) ("'An enterprise is particularly likely to be found where ... the enterprise alleged is a legal entity rather than an 'associational enterprise.'").

But association-in-fact enterprises raise more difficult issues. In *United States* v. *Turkette*, this Court did provide some outlines of an association-in-fact enterprise, noting that it must be "an ongoing organization, formal or informal" where its members "function as a continuing unit" with "a

common purpose of engaging in a course of conduct," and the enterprise must be "separate and apart from the pattern of activity in which it engages." 452 U.S. 576, 583 (1981). But the lower courts have struggled to define this category of enterprise,[12] dividing, for example, over the proof necessary to show the required structure[13] and the meaning of *Turkette*'s "common purpose" requirement.[14] While these difficulties may to some degree reflect the lack of precision inherent in the phrase "group of individuals associated in fact," Congress included the category to ensure that the mob and criminal gangs fell within RICO's sweep. Nothing in RICO's text or legislative history suggests that this Court should expand the difficulties connected with defining association-in-fact enterprises to include associations in fact of corporations. At a minimum, if Congress had wanted every group involving a corporation to be an enterprise, it would have said so, as it said that a "group of individuals" could be an enterprise.

---

[12] *See, e.g.*, 2 O. Obermaier & R. Morvillo, *White Collar Crime, Business and Regulatory Offenses* § 11.04[1], at 11-10 (2005) ("[m]uch of the controversy [over whether an enterprise exists] has centered on the catch-all provision—'associations-in-fact'"); *see also* Rakoff & Goldstein, *supra*, § 1.05, at 1-49 ("Most of the remaining controvers[ies] over the enterprise element of a RICO claim concerns the concept of a 'group of individuals associated in fact' included in the definition.").

[13] *See, e.g., Chang* v. *Chen*, 80 F.3d 1293, 1297 (9th Cir. 1996) ("Turkette does not specify how much structure an organization must have to be an enterprise under RICO. This issue has divided the circuit courts that have considered it.").

[14] *Compare, e.g.*, Pet. App. 8a ("the common purpose of making money was sufficient under RICO"), *with Baker*, 357 F.3d at 691 (no common purpose because "IBP wants to pay lower wages; the recruiters want to be paid more for services rendered (though IBP would like to pay them less) .... These are divergent goals").

II. A CORPORATION DOES NOT CONDUCT OR PARTICIPATE IN THE CONDUCT OF THE AFFAIRS OF A DISTINCT ENTERPRISE BY CONTRACTING FOR ITS OWN BUSINESS ACTIVITIES.

Assuming for the sake of argument that an association-in-fact enterprise can sometimes include legal entities such as a corporation, this Court should narrowly restrict such a combination to one with an existence and activities that are clearly distinct from a member corporation. The allegations in this case are plainly insufficient because they violate two fundamental limitations on RICO liability. First, the RICO defendant must be distinct from the enterprise whose affairs the defendant conducts. See *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 161 (2001). Second, the defendant must *conduct* (or participate in the conduct of) the affairs of *an enterprise* with which the defendant is "employed ... or associated"—not merely its own affairs. See *Reves* v. *Ernst & Young*, 507 U.S. 170, 185 (1993).

The Eleventh Circuit's opinion below ignores both these limitations on the scope of RICO and improperly allows plaintiffs to pursue claims against a corporation by alleging that the corporation entered into routine business relationships to perform the activities of the corporation. Thus, contrary to § 1961(4), almost any group involving a corporation or other legal entity can be a RICO "enterprise," and almost any alleged corporate conspiracy is a ripe target for a treble damages civil suit.[15]

---

[15] These same concerns also support adopting an interpretation of "enterprise" that limits an association-in-fact enterprise that contains legal entities to circumstances where the "group" has functions and activities that are distinct from those of its member entities. Absent such a limitation, § 1961(4) would have to be interpreted such that every "group" that contains an entity could qualify as an enterprise in exactly the same way that every "group of individuals" could qualify as an enterprise. That improper reading would mean that Congress' decision expressly to

In this case, respondents did not and could not allege any enterprise whose purpose and activities were distinct from those of Mohawk. Respondents allege they were harmed by Mohawk's hiring practices. Hiring its own employees is a classic internal function of a company. Such an undertaking does not create a distinct enterprise nor is it conducting a separate enterprise's affairs. The court's holding is contrary to the plain language of RICO, ignores this Court's RICO precedents, and expands RICO well beyond all reasonable limits.

A. Under § 1962(c), A RICO Defendant Must Conduct Or Participate In The Conduct Of A Distinct Enterprise.

In *Cedric Kushner*, this Court held that, under the plain language of § 1962(c), a RICO defendant (*i.e.*, a RICO "person") must be distinct from the RICO enterprise. See 533 U.S. at 160. Section 1962(c) provides that "[i]t shall be unlawful for any person employed by or associated with any enterprise ... to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs." As this Court explained, "[i]n ordinary English one speaks of employing, being employed by, or associating with others, not oneself." *Cedric Kushner*, 533 U.S. at 161. Therefore, to recover under § 1962(c), a plaintiff must "prove the existence of two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name." *Id.* at 158. In addition, RICO liability requires that the defendant have "conducted or participated in the conduct of the '*enterprise's* affairs,' not just [its] *own* affairs," *Reves*, 507 U.S. at 185. Thus, RICO requires both an enterprise that is distinct from the defendant and that the defendant direct the affairs of that distinct enterprise through the illegal conduct.

---

include a "group of individuals" in § 1961(4) had no practical consequences and was mere surplusage.

The textual distinction between the RICO "person" and "enterprise" reflects an important goal of § 1962: the elimination of the corrupting influence on enterprises by persons who have unlawfully infiltrated or directed enterprises to engage in racketeering activities. As this Court has explained, "[t]he enterprise in ... subsections (a) and (b)" of § 1962 "is the victim of unlawful activity" and "the 'enterprise' in subsection (c) connotes generally the vehicle through which the unlawful pattern of racketeering activity is committed." *Scheidler*, 510 U.S. at 259. In short, the enterprise is either the victim or tool of the illegal activity and is, therefore, distinct from the wrongdoer, the RICO "person."

In practice, the limitations recognized in *Cedric Kushner* and *Reves* have restricted plaintiffs' ability to sue corporations as RICO defendants because those entities logically would tend to be the victim or vehicle of the RICO persons, not the RICO persons themselves.[16] As this Court has noted, "Whether the [RICO] Act seeks to prevent a person from victimizing, say, a small business, or to prevent a person from using a corporation for criminal purposes, the person and the victim, or the person and the tool, are different entities, not the same." *Cedric Kushner*, 533 U.S. at 162 (citations omitted). Moreover, this limitation ensures that RICO's harsh penalties (including treble damages) are visited upon those individuals who misuse a corporation and not upon the company's shareholders or innocent employees. See, *e.g.*, Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. at 922-23 ("The Congress finds that ...

---

[16] This "distinctness" requirement does not prevent RICO from being used to pursue corporate wrongdoing. *See infra* II.E. Wrongdoers who misuse corporations can be held civilly and criminally liable under RICO, with the wrongdoers named as defendants and the corporation as the enterprise. In fact, that was precisely what happened in *Cedric Kushner*. There, the enterprise was a corporation and the RICO defendant was its president and shareholder. 533 U.S. at 160. This Court upheld the RICO claim. *Id.* at 163.

organized crime activities in the United States ... harm innocent investors ...."); 116 Cong. Rec. at 591 (remarks of Sen. McClellan) (noting that, "[i]n business, the mob bleeds a firm of assets, then takes bankruptcy"); Rakoff & Goldstein, *supra* § 6.04 ("Congress sought by forfeiture not only to increase economic sanctions but also to separate the defendant from control of the 'enterprise' and enjoyment of its profits.").

B. The Lower Courts Have Properly Rejected "Enterprises" That Consist Of A Corporation And Legally Separate Parties Or Entities That Merely Assist In Performing The Corporation's Functions And Activities.

Some RICO plaintiffs have attempted to meet the requirement of a "distinct" enterprise by naming a corporation as a defendant and alleging that the enterprise is an "association-in-fact" of the corporation plus third parties.[17] Thus, plaintiffs have attempted to sue a corporation by alleging it conducted a "distinct" enterprise consisting of it and its legally separate employees. As this Court noted in *Cedric Kushner*, an "owner/employee, a natural person, is distinct from the corporation itself, a legally different entity with different rights and responsibilities due to its different legal status." 533 U.S. at 163. Nonetheless, all seven Circuits to consider the issue have properly rejected claims that the combination of a corporation and its employees is distinct from the corporation itself.[18] Such an alleged

---

[17] In both *Reves* and *Cedric Kushner* the alleged enterprise was a single corporation, not an association in fact. *Cedric Kushner*, 533 U.S. at 161; *Reves*, 507 U.S. at 172.

[18] *See, e.g., Bessette* v. *Avco Fin. Servs., Inc.*, 230 F.3d 439, 449 (1st Cir. 2000) ("employees acting solely in the interest of their employer, carrying on the regular affairs of the corporate enterprise, are not distinct from that enterprise"); *Anatian* v. *Coutts Bank (Switzerland) Ltd.*, 193 F.3d 85 (2d Cir. 1999) (employees together with defendant corporation

enterprise is not only an "oddly constructed entity," *id.* at 164, but it makes little sense to speak of a corporation being distinct from an "enterprise" consisting of the corporation and its employees, because corporations can only act through individual employees. See, *e.g.*, *Riverwoods Chappaqua Corp.* v. *Marine Midland Bank, N.A.*, 30 F.3d 339, 344 (2d Cir. 1994) ("a corporation can only function through its employees and agents"). Stated differently, a corporation does not conduct the affairs of some other enterprise when it acts through its employees or agents. Instead, such a corporation is conducting its own affairs.

Other RICO plaintiffs have tried to circumvent the *Cedric Kushner* and *Reves* requirements of a "distinct" enterprise by alleging that the RICO enterprise consists of a corporation and its legally separate parent or subsidiary. As then-Judge Breyer recognized for the First Circuit, such an enterprise is not distinct from either the parent or the subsidiary because such allegations do not "charge that [the two corporations] were conducting some *other* unlawful enterprise." *Arzuaga-*

---

cannot constitute an enterprise); *Gasoline Sales, Inc.* v. *Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994) ("a corporation generally cannot be a defendant under section 1962(c) for conducting an 'enterprise' consisting of its own subsidiaries or employees, or consisting of the corporation itself in association with its subsidiaries or employees"); *Parker & Parsley Petroleum Co.* v. *Dresser Indus.*, 972 F.2d 580, 583 (5th Cir. 1992) (explaining that an association-in-fact of a corporation's employees is nothing more than the "defendant corporate entity functioning through its employees in the course of their employment"); *Bachman* v. *Bear Stearns & Co.*, 178 F.3d 930, 932 (7th Cir. 1999) ("A firm and its employees, or a parent and its subsidiaries, are not an enterprise separate from the firm itself."); *Board of County Comm'rs* v. *Liberty Group*, 965 F.2d 879, 885 (10th Cir. 1992). *See also Living Designs, Inc. v. E.I. Dupont de Nemours & Co.* 431 F.3d 353, 361 (9th Cir. 2005) (dicta) ("if the 'enterprise' consisted only of DuPont and its employees, the pleading would fail for lack of distinctiveness"); Rakoff & Goldstein, *supra* § 7.04[2], at 7-36 ("*Respondeat superior* cannot be used to circumvent the requirement under Section 1962(c) that the defendant and enterprise must be distinct.").

Collazo v. *Oriental Fed. Sav. Bank*, 913 F.2d 5, 6 (1st Cir. 1990) (Breyer, C.J.). In other words, because the corporations were not alleged to have "conducted the affairs" of "some other, larger, unlawful 'enterprise'" the alleged enterprise was not sufficiently "distinct" from the defendants to state a claim. *Id.* Thus, the court in *Arzuaga-Collazo* rejected the plaintiffs' attempt to transform "a claim that one would normally expect them to pursue in state court" into a racketeering case. *Id.* at 7.[19]

In sum, the lower courts have consistently rejected allowing an "enterprise" to include combinations involving a corporation and its natural business relationships, such as its employees or parent or subsidiary corporations. The fundamental reason is that any other approach would constitute a "broad rule ... [that] would allow the application of RICO in every fraud case against a corporation." *Brannon* v. *Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1147 (10th Cir. 1998). The same is true when the proposed "enterprise" is the combination of a corporation and third parties for the purpose of performing the corporation's own functions or activities.

---

[19] Seven other courts of appeals have rejected similar end-runs around RICO's distinctness requirement. *See Bucklew* v. *Hawkins, Ash, Baptie & Co.*, 329 F.3d 923, 934 (7th Cir. 2003); *Fogie* v. *THORN Ams., Inc.*, 190 F.3d 889, 898 (8th Cir. 1999); *Brannon* v. *Boatmen's First Nat'l Bank of Okla.*, 153 F.3d 1144, 1148-49 (10th Cir. 1998); *Discon, Inc.* v. *NYNEX Corp.*, 93 F.3d 1055, 1064 (2d Cir. 1996), *vacated on other grounds*, 525 U.S. 128 (1998); *Gasoline Sales, Inc.* v. *Aero Oil Co.*, 39 F.3d 70, 73 (3d Cir. 1994); *NCNB Nat'l Bank* v. *Tiller*, 814 F.2d 931, 936 (4th Cir. 1987), *overruled on other grounds by Busby* v. *Crown Supply, Inc.*, 896 F.2d 833 (4th Cir. 1990); *Atkinson* v. *Anadarko Bank & Trust Co.*, 808 F.2d 438, 441 (5th Cir. 1987).

C. Mohawk Does Not Conduct Or Participate In The Conduct Of The Affairs Of A Distinct Enterprise When It Contracts For Third Parties To Assist In Recruiting Mohawk's Own Employees.

Mohawk (like any company) can only acquire a workforce through the recruitment efforts of its employees and others. Indeed, many corporations have a personnel or human resources department that has as one of its primary functions recruiting employees. In acquiring part of its workforce allegedly by contracting with recruiters, Mohawk is not conducting some separate enterprise. To the contrary, Mohawk is conducting its own business. As such, it is not "employed by or associated with" some other enterprise as RICO requires. 18 U.S.C. § 1962(c); see *Cedric Kushner*, 533 U.S. at 160. As previously noted, respondents have not and could not allege that any of the recruiters were the enterprise or that Mohawk conducted their affairs.[20] Nor by such efforts does Mohawk either "conduct or participate ... in the conduct of [an] enterprise's affairs." *Id.* As this Court has explained, "liability [under RICO] depends on showing that the defendan[t] conducted or participated in the conduct of the '*enterprise*'s affairs,' not just [its] *own* affairs." *Reves*, 507 U.S. at 185.

Respondents' own allegations demonstrate that Mohawk did not direct the affairs of an enterprise that is separate and distinct from Mohawk itself. Respondents contend that the company's relationship with recruiters "exists for Mohawk's benefit." JA 23 (Compl. ¶ 78). Respondents further claim that the "common purpose" of the relationship was to "obtai[n] illegal workers for employment by Mohawk." JA 23 (Compl. ¶ 77). As noted, *ante* at 6-7, almost the entirety

---

[20] Moreover, respondents could not allege that they suffered a proximately caused injury as a result of participation in the affairs of a recruiting company.

of the conduct alleged in the complaint concerns acts by Mohawk and its employees alone, which respondents allege are "part of [Mohawk's] regular way of conducting business." JA 22 (Compl. ¶ 73). Indeed, respondents' alleged injuries (from the "suppression" of wages) are indisputably caused by Mohawk's actions in conducting its own affairs—*i.e.*, in setting the hourly wages it pays to its employees.

Respondents' central claim against Mohawk (and the basis for respondents' alleged injury) is that Mohawk allegedly recruited and hired unauthorized workers. Hiring, however, is a quintessential corporate function, since a corporation must act through natural persons. As the Seventh Circuit pointed out in rejecting materially identical allegations, "[t]he nub of the complaint is that [the defendant] operates *itself* unlawfully—it is [the defendant] that supposedly hires, harbors, and pays the unlawful workers." *Baker* v. *IBP, Inc.*, 357 F.3d 685, 691 (7th Cir. 2004) (Easterbrook, J.).

Nothing in RICO indicates that liability under that Act should turn on the size, sophistication, or outsourcing choices of a company. As noted above, the circuit courts unanimously agree that if the alleged recruiters were employees or subsidiaries of the corporation, Mohawk's use of recruiters would not constitute participation in the conduct of an enterprise distinct from the corporation itself, even though employees and subsidiaries are separate legal entities from a corporation. Every hiring case should not be turned into a federal RICO case simply because of a business decision to use a non-employee to accomplish a portion of the same corporate function.

To be sure, it is possible for a corporation to violate § 1962(c) where some truly distinct entity is the enterprise and the corporation unlawfully conducts the affairs of that distinct entity. But respondents do not allege that any of the agencies or recruiters were themselves enterprises, much less that Mohawk conducted their affairs through the alleged predicate acts. The only enterprise alleged is an association

in fact between Mohawk and these recruiters. There is no claim that Mohawk has any relationship with recruiters other than an arms-length business arrangement. See JA 23 (Compl. ¶ 76) ("Each recruiter is paid a fee for each worker it supplies to Mohawk ....."). Such a relationship is not a separate enterprise within the meaning of RICO.

The Eleventh Circuit's approach would turn many garden-variety tort cases into federal RICO cases, merely because the corporation chose to use a legally separate individual or entity to perform a corporate function or activity. Consider a small business that employs a few individuals, but does not have the resources to hire a general counsel. Suppose that the small business uses a local attorney to prepare bank loan applications. If a corporation together with this attorney constitute a distinct "enterprise," then the business would be open to a RICO suit alleging that the loan applications were fraudulent—simply because it used an outside attorney to prepare those applications.[21] See 18 U.S.C. § 1961(1)(B) (RICO predicate acts include fraud against financial institutions). Conversely, if a larger company with an in-house lawyer (who is an employee) engaged in precisely the same actions, RICO would not apply. The company plus the employee lawyer would not constitute an enterprise distinct from the company itself. In neither case, however, would the company "conduct" the affairs of some separate enterprise—on the contrary, each company is conducting its own affairs.

Again, this is not to say that RICO cannot be implicated in the relationship between an individual or a corporation and a law firm. The popular book *The Firm* described a situation that is precisely what RICO is aimed at eliminating. See J. Grisham, *The Firm* (1991). There individuals associated with organized crime infiltrated and corrupted an entire law firm,

---

[21] This concern is not fanciful. *See, e.g., Living Designs*, 431 F.3d at 369-70 (holding that corporation and outside law firms representing it in litigation may constitute RICO enterprise).

which then seemingly engaged in the ordinary practice of law, but in fact promoted the underlying illegal purposes of an organized crime group. The law firm was the enterprise. Here, respondents do not allege that the employment agencies are the enterprise, much less an enterprise infiltrated by Mohawk. They allege only that the enterprise exists in the arms-length association between Mohawk and its recruiters. This arrangement is one that RICO does not regulate.

Likewise, suppose that a bank hired a local accountant to assist it in advising clients about loan consolidation. Under the Eleventh Circuit's reasoning, the bank could be subject to a civil RICO suit alleging that it committed mail and wire fraud and conducted a RICO enterprise consisting of a grouping of it and the local accountant. If, however, a larger bank used an in-house accountant, this staffing would once again remove all potential RICO liability. RICO's application, then, would turn on the size of the corporation, its resources, and its determination to rely upon outside expertise, rather than on the substance of the conduct at issue.

On its face, this example is similar to the allegations held insufficient in *Reves*. In that case, the alleged enterprise was the company itself, and this Court held that the outside accounting firm was not liable under RICO because its preparation of financial statements did not "direc[t] th[e] affairs" of the company. *Reves*, 507 U.S. at 179. In the wake of *Reves*, plaintiffs have attempted to circumvent its force by alleging association-in-fact enterprises consisting of both the company and an accounting firm or similar third party.[22] Indeed, such hypothetical enterprises are not dissimilar than the one alleged in the instant case: a company plus a service provider that the company pays on a fee-for-service basis.

---

[22] *See, e.g., Discon*, 93 F.3d at 1064 (alleging association-in-fact enterprise of corporations and their "'attorneys, accountants, and other agents'"), *vacated on other grounds*, 525 U.S. 128 (1998).

As the Seventh Circuit has observed, allowing RICO liability to turn on the vagaries of corporate organization would create a perverse incentive for companies to insulate themselves from the prospect of treble damages RICO strike suits by vertically integrating tasks previously performed by third-party agents. See *Fitzgerald* v. *Chrysler Corp.*, 116 F.3d 225, 227 (7th Cir. 1997) (Posner, C.J.) ("What possible difference, from the standpoint of preventing the type of abuse for which RICO was designed, can it make that Chrysler sells its products to the consumer through franchised dealers rather than through dealerships that it owns ... ?"). Nothing in RICO requires that liability turn on such meaningless distinctions. A corporation that contracts for assistance with its own functions or activities from a non-employee is not participating in the conduct of the affairs of some distinct enterprise merely because the alleged enterprise consists of the two together.[23] In short, the enterprise "must be more than an association of individuals or entities conducting the normal affairs of a defendant corporation." *Brittingham* v. *Mobile Corp.*, 943 F.2d 297, 301 (3d Cir. 1991), *overruled on other grounds, Jaguar Cars, Inc.* v. *Royal Oaks Motor Co., Inc.*, 46 F.3d 258 (3d Cir. 1995).

The critical distinction is whether the corporation is conducting the distinct affairs of another corporation or some separate new enterprise, or whether the corporation is simply using another organization to assist the corporation in its own

---

[23] *See Baker*, 357 F.3d at 691-92 (determining that no construction of the defendant corporation together with its agents constituted a proper RICO enterprise); *Fitzgerald*, 116 F.3d at 228 (refusing to conclude that an enterprise consisting of subsidiaries, dealers, and financial institutions controlled by the defendant was properly pled); *Discon*, 93 F.3d at 1064; *Brittingham* v. *Mobil Corp.*, 943 F.2d 297, 303 (3d Cir. 1991) (concluding the distinctness requirement "would be eviscerated if a plaintiff could successfully plead that the enterprise consists of a defendant corporation in association with employees, agents, or affiliated entities acting on its behalf"), *overruled on other grounds, Jaguar Cars, Inc.* v. *Royal Oaks Motor Co., Inc.*, 46 F.3d 258 (3d Cir. 1995).

affairs (legal or otherwise). Here, respondents have not alleged that Mohawk somehow corrupted another organization; they rather alleged that Mohawk was operating itself unlawfully, by using recruiters and employment agencies to help Mohawk carry out its own function and activity of hiring workers. Hiring employees is a core corporate function—indeed, in a manufacturing business like Mohawk's, hiring employees is at the very heart of Mohawk's conduct of its own business. Respondents have simply not alleged that Mohawk conducted the affairs of a distinct enterprise, and therefore their § 1962(c) claim must be dismissed.

D. The Eleventh Circuit's Separate Legal Entity Test Is Inconsistent With This Court's Interpretations of RICO's Text And Purposes.

The separate legal entity test that the Eleventh Circuit used to determine that respondents sufficiently alleged a RICO enterprise is incompatible with any sensible interpretation of RICO. Indeed, the Eleventh Circuit's test effectively negates the "enterprise" requirement by finding an "enterprise" whenever legally separate entities allegedly conspired in any way. According to the Eleventh Circuit, an "enterprise" requires no more than "the existence of an association of individual entities, however loose or informal." Pet. App. 7a (quoting *United States* v. *Goldin Indus., Inc.*, 219 F.3d 1271, 1275 (11th Cir. 2000)). Therefore, it was enough in this case for respondents to plead that "Mohawk and the third-party recruiters are distinct entities" who allegedly were "engaged in a conspiracy." *Id.* at 7a-8a. In the Eleventh Circuit's view, any conspiracy or other "loose or informal" association between legally separate entities creates an association-in-fact enterprise. This cannot be the law.[24]

---

[24] The Sixth Circuit has used a similarly deficient test. *See Davis* v. *Mutual Life Ins. Co. of N.Y.*, 6 F.3d 367, 377-78 (6th Cir. 1993) (determining that RICO defendant insurance company was distinct from

The Eleventh Circuit's talismanic reliance on whether the alleged enterprise contains parties that are legally separate entities from the RICO defendant makes little sense. Indeed, this rule is inconsistent with the decisions that unanimously reject enterprises consisting of a company and its employees or a parent and subsidiary, even though both an employee and a subsidiary are legally separate from a corporation. See *supra* Section II.B. But the legal separation between corporation and employee is not enough to create an enterprise separate from the corporation.

Instead, whether a defendant corporation conducts or participates in the conduct of a distinct RICO enterprise requires an analysis of whether the corporation is "employed by" or "associated with" a separate enterprise and whether, through the alleged acts of racketeering, the corporation participates in the conduct of the affairs of that enterprise, not just its own affairs. See 18 U.S.C. § 1962(c). When the circuit courts have hewed closely to this statutory analysis, they have repeatedly held that a corporation—whether it acts through its employees, subsidiaries, or others—does not create and direct a distinct enterprise under § 1962(c) merely because it contracts and conducts its own business affairs with and through such parties. It is simply not enough for the corporation to direct its own affairs through a series of alleged predicate acts concerning the recruitment, hiring and compensation of the company's own employees—even if service contractors are involved in that conduct.

The sort of RICO enterprise that respondents have pled here is therefore patently deficient; there are no allegations that Mohawk managed or controlled the affairs of the employment agencies, and the allegations do not show that Mohawk was directing the affairs of an association-in-fact enterprise with its own separate set of activities and functions.

"enterprise" of insurance agency selling defendant's policies because the insurance agency was a "distinct entity" with a separate legal existence).

Rather, the only allegation is that Mohawk conducted its own affairs through a pattern of immigration violations and on occasion used employment agencies on a fee basis to recruit employees. This is not actionable under RICO.

Indeed, myopically focusing on whether the corporation and the other alleged enterprise members are merely legally separate subverts the purpose of RICO. Section 1962(c) was narrowly crafted to target wrongdoers who were misusing enterprises to carry out a pattern of racketeering activity. RICO sanctions are therefore "directed at the persons who conduct the racketeering activity, rather than the enterprise through which the activity is conducted." *Brittingham*, 943 F.2d at 301. Targeting "enterprises" that are functionally indistinct from the persons conducting them transforms RICO from a statute focused on the misuse of organizations into a general conspiracy statute imposing civil liability (with treble damages) whenever a corporation conspires with some service provider that the corporation hires.

Given the many torts that are classified as "racketeering violations," see 18 U.S.C. § 1961(1), the substantive limits of § 1962(c) must be enforced to prevent an explosion of RICO civil strike suits targeting corporations for treble damages awards. See *Reves*, 507 U.S. at 183 (§ 1962(c)'s requirements are a "critical limitation" on the scope of RICO). "RICO ... is not a conspiracy statute," *Fitzgerald*, 116 F.3d at 228; rather, it only extends to "the acquisition or operation of an enterprise," *Reves*, 507 U.S. at 182. Congress did not intend for RICO to be an indiscriminate tool to sue corporations for conducting their own affairs, but this is precisely what results from the Eleventh Circuit's formalistic application of the "separate legal entity" test, which recognizes an "enterprise" whenever a corporation contracts with another entity.

E. Properly Interpreting RICO Will Not Impair Its Use Against Criminal Wrongdoing.

Neither properly interpreting the definition of enterprise nor enforcing the requirement of participation in the conduct of a distinct enterprise (as set forth above) will impair RICO's usefulness as a tool to attack corporate wrongdoing. In the first place, the persons engaging in the wrongful conduct—the officers and managers who direct a corporation to engage in racketeering activity—will always be appropriate § 1962(c) defendants when they conduct the affairs of that corporation through a pattern of racketeering activity.[25] And a corporation that conducted its own affairs through a pattern of racketeering offenses of course could be held criminally liable for the underlying offenses.

Moreover, like any other RICO person, a corporation can violate § 1962(c) by conducting the affairs of a legal entity that is distinct from the corporation itself. To vary the example from Section II.C above, if the corporation that used agents to falsify its own bank loan applications had instead systematically bribed bank officials as part of a scheme to influence decisions on bank loan applications, that corrupt direction of the bank's affairs could be a § 1962(c) violation.

Sections 1962(a) and (b) provide additional avenues to target corporate crime. Section 1962(a) prohibits "any person [including a corporation] who received any income ... from a pattern of racketeering activity" from "us[ing] or invest[ing], directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise." As a result, a corporation involved in racketeering activity can be

---

[25] Such wrongdoers face substantial criminal penalties, including imprisonment of up to 20 years, fines of up to $250,000 or twice the gross pecuniary gain from the offense (whichever is greater), and forfeiture of any interest in the enterprise and any interest acquired through the RICO violation. *See* 18 U.S.C. § 1963(a); *id.*§ 3571.

prosecuted for using any proceeds from that activity to acquire and operate an enterprise. In addition, corporations can be prosecuted under § 1962(b) for using racketeering activity to acquire or maintain "any interest in or control of any enterprise."

Alleging § 1962(a) and (b) violations may be a less popular tack for civil plaintiffs than alleging § 1962(c) violations, because plaintiffs must show that a corporation's use of racketeering proceeds injured their business or property. But all of § 1962's provisions are and will remain powerful tools in the government's arsenal against corporations who engage in racketeering activity. In addition to subjecting companies to substantial fines, RICO has an extensive criminal forfeiture provision, requiring a corporation to forfeit all property obtained (even indirectly) from racketeering activity. See 18 U.S.C. § 1963(a) (2), (3) (requiring forfeiture of all "property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity" and any "interest in ... any enterprise"). See also Alito, *supra*, at 8 ("RICO contains very broad, innovative, and highly effective forfeiture provisions.").

In sum, RICO provides broad remedies to address the conduct at which it was targeted: conducting "'organizations in a manner detrimental to the public interest.'" *Cedric Kushner*, 533 U.S. at 165 (quoting S. Rep. No. 91-617, at 82). What it does not provide is license for civil plaintiffs to sue ad hoc associations in fact that never were contemplated in § 1961(4), particularly when those alleged enterprises only consist of a defendant corporation conducting its own business affairs with the arms-length assistance of third parties.

CONCLUSION

For the foregoing reasons, the judgment of the Eleventh Circuit should be reversed.

Respectfully submitted,

CARTER G. PHILLIPS*
RICHARD D. BERNSTEIN
JUAN P. MORILLO
STEVEN T. COTTREAU
JULIE A. GURLEY
MATTHEW J. WARREN
JIMMY R. ROCK
SIDLEY AUSTIN LLP
1501 K Street, NW
Washington, DC 20005
(202) 736-8000

Counsel for Petitioner

* Counsel of Record

February 2, 2006